shipper, the carrier has no right to open it on his own, and if he does, as in this case, he becomes liable for any shortage of the goods stated in the bill of lading.

In my judgment, on the facts of this case and the law applicable, the plaintiffs were not disentitled by the conditions in the bill of lading from relying on the admission that cartons to the number stated in the bill of lading were packed in the container and the defendants were accordingly under an obligation to deliver the full number of cartons. On the evidence they had failed to do so. There had been a short delivery of 205 cartons for which the defendants were liable. The plaintiffs valued the 205 cartons at $16,912.50 which value was accepted by counsel for the defendants. Accordingly judgment was entered for the plaintiffs against the defendants in the sum of $16,912.50 and costs as taxed.

Claim allowed.

Solicitors: *Chan, Goh & Co.; Drew & Napier.*

MALAYSIAN REPORTS

GOVERNMENT OF PAKISTAN v. SENG PENG SAWMILLS SDN. BHD. & ORS.

[F.C. (Raja Azlan Shah, Wan Suleiman & Syed Othman F.JJ.) August 8 & October 11, 1978]

[Kuala Lumpur — Federal Court Civil Appeal No. 18 of 1978]

Practice and Procedure — Injunction — Whether applicant has legal right — Privity of contract — Contract with foreign government.

Contract — Contract to purchase — Price already paid for — Misrepresentation by 2nd and 3rd respondents — 1st respondent not privy — Injunction against 1st respondent disallowed — Damages against 2nd and 3rd respondents.

The appellant sought an injunction to restrain the first respondent from removing various types of railway sleepers to enable the appellant to ship them to Pakistan. It was alleged that the appellant had entered into agreements with a company in Pakistan as agents for the second and third respondents for the purchase of the sleepers and that the second and third respondents had contracted to purchase the sleepers from the first respondent for shipment to Pakistan.

Held: (1) in this case on the facts there was nothing in the acts of the first respondent which would make it owe a duty to the appellant or give the appellant a legal right against the first respondent. The acts of the first respondent were all towards the second and third respondents;

(2) the learned trial judge was correct in refusing the injunction as the appellant had not shown that it had a legal right against the first respondent.

Case referred to:-

(1) *Fulwood* v. *Fulwood* (1878) 9 Ch. D. 176.

In the High Court at Kuantan the following judgment was delivered on January 19, 1978:

Abdul Razak J.: This is an application for an injunction to restrain the respondents from disallowing the applicant to remove certain railway sleepers which lay at Kuantan jetty. The applicant is the Government of Pakistan. The 2nd and 3rd respondents are residents in Singapore. The 1st respondent resides and deals in timber in Kuantan. The applicant alleged that an agreement was entered into between it and the 2nd and 3rd respondents for the purchase of sleepers. The 2nd and 3rd respondents had in turn made an agreement with the 1st respondent for the supply of the sleepers. It is alleged by the applicant that it had only received a part of the consignment of the goods contracted. It contended that the 1st respondent by his conduct had assented to the sale of his timber by the 2nd and 3rd respondents to it. The applicant had applied to the 1st respondent for delivery of the remaining consignment, but the 1st respondent said that all the timber had been delivered to the 2nd and 3rd respondents at the jetty in Kuantan. It alleged that the 2nd and 3rd respondents had received full payment for the total consignment. It was said that in oral conversation with the 1st respondent's counsel the latter made it clear that the 1st respondent would not release the remaining sleepers unless payment was made by the 2nd and 3rd respondents for the balance of the purchase price. The applicant had asked the 2nd and 3rd respondents for delivery but they only replied that they would not be responsible for any damage caused by any delivery to it at this stage. The applicant said that the 1st respondent could not

claim a lien on the balance of the unpaid price. It alleged that the 1st respondent's paid up capital was only $592,000 which was far less than the amount of the loss which the applicant would incur if its contract was not fulfilled. The applicant was seeking the injunction to mitigate his loss.

The 1st respondent in his affidavit said that he had no prior knowledge of the contract between the 2nd and 3rd respondents and the applicant. If at all, the contract between the 2nd and 3rd respondents and the applicant was governed by the Law of Pakistan. That the 1st respondent not being a party to this contract there was no privity of contract between the 1st respondent and the applicant. The 1st respondent could not therefore be made liable for the contract between the applicant and the 2nd and 3rd respondents. The 1st respondent alleged that under the contract made between him and the 2nd and 3rd respondents the 1st respondent was only responsible for arranging the shipment and transportation of cargo. He was never responsible for the transportation or shipment and as such could not be held responsible for matters arising out of the contract between the 2nd and 3rd respondents and the applicant. He also denied that he was responsible for doing all things necessary for effecting the necessary payment to be made by the applicant to the 2nd and 3rd respondents. He quoted one instance that the Bills of Lading for the consignment of the goods were never shown to him. He said that the applicant's present predicament was brought about by his own carelessness or negligence in paying contrary to their agreement with the 2nd and 3rd respondents before the goods were actually received. The 1st respondent also said that there had been considerable delay in bringing this action which had induced him to change his status. The cause of action arose, if any, in 1975. He further stated that the Malaysian Timber Board itself had refused to intervene in the dispute between the 1st respondent and the applicant. The 1st respondent maintained that he had not assented to the contract between the applicant and the 2nd and 3rd respondents in the sale of the timber to the applicant. He said that the fact that he had now filed an action against the 2nd and 3rd respondents was merely proof of that fact.

According to the applicant, the application was made on the basis that it was to mitigate his loss. I have not been indicated on what authority an interlocutory injunction, and a mandatory one at that, can be made to mitigate one's loss where the question whether there had been loss at all and by whom had yet to be decided. In saying that the application was to mitigate his loss the applicant had arrogated to itself the right to say that the 1st respondent was at fault and therefore it must now only be the court's duty to mitigate his loss. Was there anything therefore more for the court to decide when the issue as to whether the plaintiff had suffered loss or not had already been settled by the applicant himself. But there was something more fundamental on which I think lies the answer to the present application. Should the court allow these goods to leave Malaysian shores then if the application is allowed and the applicant eventually failed in his suit against the 1st respondent, the 1st respondent would have no means to recover them since they would be outside the court's jurisdiction. This must be the inevitable consequence if we accept the rule, and I think the rule had not changed, that in the Comity of Nations no sovereign power is amenable to the process of court of another sovereign power outside its jurisdiction. (See *Halsbury's* page 351, 3rd Edition, Vol. 21, Paragraph 736). Would the court in the circumstances be doing substantial justice between the parties by allowing an injunction? Clearly the applicant has all to gain and nothing to lose by not succeeding in the present application. It could proceed with the suit for damages; if it loses it could invoke its immunity and elect not to be bound by the court's order. In the uneasy and uncertain state of affairs currently prevailing in the State of Pakistan any of these possibilities arising could not be entirely excluded. There was a faint suggestion by counsel that the Pakistan Embassy was at the 1st respondent's disposal. But the property or territory was in the comity of nations as good as the property and territory of Pakistan itself enjoying the same immunity of seizure or arrest being strictly outside the court's jurisdiction. The public property of a sovereign State and the private property of a sovereign Ruler are protected from arrest in an action *in rem* (*Halsbury's* (3rd edn.) Vol. 7, page 266). The privilege may be waived. I think we can safely assume that there has been one by the filing of the writ, but a waiver does not necessarily imply that execution may issue — (see page 272). In any event the waiver must be made by the direction and with the consent of the sovereign (see page 271) of which the plaintiff's affidavit has made no reference to. Let alone, enclose one. But the situation was not the same as far as the 1st respondent was concerned. If he lost the suit he had no choice but to pay the damages. If he won the suit he might still be the loser because for reasons just stated he might obtain just an empty judgment. Enough was said about granting an injunction to mitigate one's loss. In an application for an interim injunction it must also be shown that the parties acted expeditiously and that there was great urgency in granting the application which apparently was not the case here. It was urged that the underlying principle of this application was conversion of the applicant's goods by the 1st respondent. Conversion according to *Winfield* (10th Edition page 413) is any act in relation to the goods of a person which constitute an unjustifiable denial of his title to them. By implication therefore if the denial of title is justified then there is no conversion. Thus even assuming for the moment the title of goods in the possession of the 1st respondent were with the applicant, where was the unjustifiable denial of his title to them by the 1st respondent? The circumstances were in fact on the contrary, the applicant had chosen to make a contract with the 2nd and 3rd respondents purporting to buy timber from them when in fact they had none; that the goods were in fact with the 1st respondent. There would appear therefore to be a contract based on a misrepresentation made by the 2nd and 3rd respondents to the applicant and yet the latter had chosen to proceed with the bargain and accept the timber from the 1st respondent on a contract made with the 2nd and 3rd respondents. Surely the applicant cannot now go be-

hind whatever arrangement or agreement that might exist between the 1st, 2nd and 3rd respondents regarding the supply of the timber. If he had chosen to reap the benefit of the arrangement or agreement he must also be deemed to have agreed also to accept the liability that arise from it. And the liability that he must face was the possibility, firstly, that the buyers which in this case were the 2nd and 3rd respondents, would not pay for the goods of the seller, the 1st respondent, at any given moment and therefore the right would arise of the seller to retain the goods as lien for the purchase price. Secondly, in this case, at any rate since the 2nd and 3rd respondents had shown by their misrepresentation that they were capable of acting improperly that they were also capable of acting likewise to the 1st respondent and in allowing the contract to continue. The applicant must accept therefore the consequences of the 2nd and 3rd respondents' ill-doing. Another way of stating the situation in which the applicant found himself in is that he cannot approbate and reprobate at the same time, because that would clearly be acting unfairly and unjustly to the 1st respondent, without giving him any remedy. I think it is only fair to say that the right of the applicant to conversion must first be subject to the right of the 1st respondent for his purchase price against the 2nd and 3rd respondents. In that sense there cannot be an unjustifiable denial of his title, if any, to the goods. In my view the plaintiff's claim against the 1st respondent can be compensated for by damages.

I would therefore dismiss the plaintiff's application with costs.

From the above judgment the applicant appealed to the Federal Court.

FEDERAL COURT.

Y.M. Chin for the appellant.

V. Balendran for the first respondent.

S. Pathmanathan for the second and third respondents.

Syed Othman F.J.: This appeal is against the decision of the High Court at Kuantan dismissing the application of the appellant seeking that the respondents, their servants or agents or any party claiming through them, be restrained from disallowing the appellant, its servants or agents, from removing various types of railway sleepers and railway crossing timbers (herein referred to as sleepers) lying at the jetty at Kuantan to enable the appellant to ship the sleepers to Pakistan. The application also seeks other orders including an order that the appellant gives an undertaking to pay the respondents' damages in the event of the appellant not succeeding in its claim and which result from the appellant having removed the sleepers.

The circumstances shown in the supporting affidavit on which the appellant based its application are about the same as in the statement of claim. They are as follows: The first respondent, a Malaysian company, having its registered office in Pahang, is an authorised exporter of timber; the second and third respondents are partners of a business known as National Timber and Trading Company of Singapore; on June 23, 1975 the appellant entered into two agreements with a company known as National Agencies Ltd. of Pakistan, as agents of the second and third respondents, for the purchase of the sleepers; the second and third respondents contracted with the first respondent to purchase all the sleepers for shipment to Pakistan; at an earlier stage all the sleepers were located at the Kuantan jetty and at the sawmill of the first respondent; the first respondent made all arrangements with the Customs for the grading of the sleepers and consigning them to the appellant; the first respondent also provided the second and third respondents with the grading certificates which enabled the second and third respondents to obtain payments from the appellant; on August 10, 1977 the first respondent through their solicitors wrote a letter to the Collector of Land Revenue, Kuantan stating that the second and third respondents were responsible for the railway sleepers lying on the State land, and by the letter the appellant alleges that the first respondent has accepted the stand that the sleepers were the property of the appellant; the appellant has so far obtained delivery of 17,245 railway sleepers, 8,601 railway crossing timbers from second and third respondents, leaving a balance of 54,354 railway sleepers and 11,145 railway crossing timbers; the first respondent has sold a substantial portion of the sleepers to a third party and has refused to allow the appellant to take the remaining sleepers, even though the second and third respondents have allowed it to do so. It is contended that unless the first respondent is restrained from disallowing the appellant to collect the sleepers, they will deteriorate and the appellant will suffer loss more than the paid up capital of the first respondent.

It is obvious that although ostensibly the application was against all the respondents, the main target was the first respondent in view of the fact, as the learned trial judge observed, the second and third respondents with whom the appellant entered into contract had no sleepers.

The learned trial judge's reasons for dismissing the application can be put into four grounds. In substance they are: (1) mitigation of loss was yet a matter to be determined and it was not for the appellant to arrogate to itself the right to decide that the first respondent had been at fault; (2) if an injunction was granted the first respondent would not be able to recover the sleepers as they would be out of the court's jurisdiction and the court would have no means of enforcing its order against the appellant, as it is a sovereign State; (3) the appellant had not acted expeditiously and had not shown urgency in making the application; and (4) there was no privity of contract between the plaintiff and the first respondent.

The appeal seems to rest mainly on questions of fact. Encik Chin, for the appellant, referred to *Fullwood* v. *Fullwood*[1] where it was held that mere lapse of time will not be a bar to the granting of an injunction, unless it would be a bar to the legal right. It was also held there when an injunction is sought in aid to a legal right, the court is bound to grant it if the legal right is established. In reference to the present appeal, the appellant must show that it had a legal right against the first respondent, despite the fact

that there was, as conceded, no privity of contract. It is argued in effect that the acts of the first respondent indicated above do constitute a legal right, because they enabled the second and third respondents to fulfill their obligations to the appellant, they must be taken as giving the appellant the right to the sleepers.

For the purpose of the appeal, we need only examine these acts and ascertain whether they, considered singly or together, give the appellant the right.

The evidence is not much in dispute. The appellant in June 1975 entered into two agreements with the agents of the second and third respondents for the supply of the sleepers. The first respondent provided the second and third respondents with the grading or inspection certificates in respect of the sleepers so that they could be shipped to the appellant, and the first respondent also provided the second and third respondents with letters of credit which the second and third respondents used to get payments from the appellant.

The grading or inspection certificates are required by the law in this country for any export of timber. By providing these certificates for the shipment of the sleepers, the first respondent was merely performing its obligation under the law and perhaps towards the other respondents who would need them for their purpose.

From the affidavit, it is not clear whether the past shipments of the sleepers were from Kuantan direct to Pakistan or from Kuantan to Pakistan via Singapore. The preparation of bills of lading and invoices must have been in Singapore, as the second and third respondents are based there. It is stated in the appellant's affidavit that the first respondent made all the arrangements for shipments. The shipments could not have been direct from Kuantan, as by clause 4. 2(a) of the appellant's agreement with the second and third respondents, there must be an inspection certificate issued by the Timber Industry Board, Singapore. This Board does not operate in Kuantan, and the shipments could not have been made without the bills of lading and invoices from the second and third respondents. Even assuming the shipment or consignment was direct from Kuantan, the first respondent was merely accommodating the second and third respondents. At the most the first respondent could only be treated as a conduit pipe through which the appellant got the sleepers from the second and third respondents.

As to payment of second and third respondents, which is said to have been made, on letters of credit received from the first respondent, clause 4. 2(a) of the appellant's agreement with the second and third respondents reads as follows:

"(a) 99¼% of C & F value of Sleepers on order is payable in Singapore Dollars to your Principals M/s National Timber and Trading Company Singapore through an irrevocable letter of credit to be established in their favour, against presentation of the following documents:

(i) Inspection Certificate issued by the Timber Industry Board, Singapore.

(ii) Commercial invoices (eight copies).

(iii) Negotiable Bill of Lading.

(iv) Unconditional Bank Guarantee for 10% value of the order in favour of the President of Pakistan as a cover for defective workmanship and/or bad material, which should be valid for a period of 12 months from the date the Sleepers are delivered to the consignee at Karachi."

It is obvious that any duty required under the above clause lies on the second and third respondents and cannot be attributed to other persons simply because they made the documents available to the second and third respondents.

One would have thought that in the normal course of business of this nature, any Government body would only make payments on delivery of goods. Indeed, in paragraph 9 of the affidavit by the manager of the first respondent, it is deposed that under the terms of the contract between the appellant and the second and third respondents, payment was to be made on receipt of the sleepers and certification by the Pakistani officials in respect of the quantity and quality of the sleepers. There is no reply to this. The fact that the first respondent supplied letters of credit or bills of lading to the second and third respondents as required by the appellant pursuant to the clause does not make the first respondent liable under the contract; inasmuch as the bank guarantee under clause 4. 2(a) cannot make the bank issuing the guarantee so liable. In any case, payment could not have been made solely on the letters of credit or bills of lading. The invoices should be regarded as the principal documents and they could only come from or at the instance of the second and third respondents. It is also deposed that the first respondent delivered the sleepers to the second and third respondents thereby enabling the second and third respondents to obtain bills of lading for shipment of the goods to the appellant. I would say that this does not give a right to the appellant against the first respondent. The bills of lading are a matter for the second and third respondents to fulfill their obligations to the appellant. The duty of the first respondent was towards the second and third respondents.

As to the letter to the Collector of Land Revenue, Kuantan of August 10, 1977, a translation of the crucial part reads:

"The abovementioned sleepers had been sold to the National Timber & Trading Co. and should be transported on early October, 1975. But, due to the transportation problems between the exporter, National Timber & Trading Co. and the shipping party, those sleepers were not transported. Though warnings had been given several times to the exporter to collect the above sleepers and to pay the balance of $229,667.13, the exporter still did not take any action. Therefore, our client had taken up a civil claim on the exporter for the balance of money which has not been settled.

To prolong this case, the Government of Pakistan, being the buyer of the above sleepers, claimed that they had paid to the exporter, National Timber & Trading Co. for all the export commodities. Therefore, they claimed to be the owner of the sleepers which had been lain on the Government land. On our behalf, we are not related with the contract and we could not make any claim. As far as we know, National Timber & Trading Co. is responsible for the sleepers which were lain on the State land."

The letter should be clear. The buyer, i.e. second and third respondents, are to collect the sleepers on payment of the balance of $229,667.13. In the last

sentence of the last 6th paragraph the letter says: "We also enclose a letter dated 8th February, 1977 from National Timber & Trading Co. which mentions that the sleepers are the property of Pakistan Government." I cannot regard that by this portion of the letter the first respondent was holding out that the sleepers belonged to the appellant. It was an indication as to what the second and third respondents had been asserting. It does not detract from the fact that the first respondent had no relationship with the appellant. At the most, the assertion was used for the purpose of seeking latitude from the Collector in his request that the sleepers be removed from the jetty or State land.

On the evidence adduced, I cannot see anything in the acts of the first respondent, singly or considered together, which would make it owe a duty to the appellant or give the appellant a right against the first respondent. The acts of the first respondent were all towards the second and third respondents.

Considering all the circumstances, assuming that the appellant has made all payments that are due to the second and third respondents and the second and third respondents have also done the same to the first respondent, it is difficult to understand why the second and third respondents are not making this application, since they are the ones who would appear to have the right under their contract with the first respondent. Indeed, they are even supporting the application. Unfortunately, in this matter they are not on the same side as the appellant. Their affidavit cannot be said to establish that by right the sleepers should be taken to have been delivered to the appellant or that the appellant has the right to take them away. By a term of their contracts with the first respondent delivery of the sleepers to them is on f.o.b. basis into vessels to be named by them. On this consideration and by their inaction, it can only be construed that even their own right is questionable. Consequently the right of the appellant cannot be said to be any better.

I do not think it is necessary to go into the other questions dealt with by the learned trial judge. They are merely ancillary issues which need only be considered if the appellant has established a right to the sleepers.

But I would note the observations of the learned trial judge to the effect that if the injunction could be granted, even with the conditions as stipulated by the appellant, the courts would have no jurisdiction to enforce relief against the breach of an engagement entered into with a foreign government. See, 21 *Halsbury* 3rd Edition, para. 736 p. 351.

The appeal is dismissed. Costs to the first respondent to be borne by the appellant, and, in view of their stand in this matter, by the second and third respondents.

Raja Azlan Shah and **Wan Suleiman F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Allen & Gledhill; Balendran & Ong; A.L. Looi & Co.*

COLLECTOR OF LAND REVENUE, FEDERAL TERRITORY v. GARDEN CITY DEVELOPMENT BERHAD

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Chang Min Tat F.JJ.) November 8 & December 14, 1978]

[Kuala Lumpur — Federal Court Civil Appeal No. 95 of 1978]

Land Law — Classification of land — Land alienated before the coming into force of National Land Code — Nature of land title — Category of use — Registry title — Town land — Land to be used neither for agricultural nor for industrial purposes — Need to apply for imposition of category of use for land to be used for building — Appeal against decision of City Planning Committee — Time for appeal — Whether landowner required to accept diminution in title from freehold to lease — National Land Code, ss. 2, 4(1), 53, 54, 110, 124, 128 and 418.

In this case the respondents as owners of the land in question wished to develop it and they applied for sub-division and conversion of the land. Without waiting for such approval, they obtained the consent of the Datuk Bandar, Kuala Lumpur, for the construction of a substantial commercial building on the land. Subsequently they were informed by the Director of Lands and Mines, Federal Territory that the Land Executive Committee had decided that their application would only be approved if (a) the respondents made certain payments for premium and tax on the change of the category of use of the land to building and (b) they accepted a 99 year lease in exchange for their title. The respondents failed to surrender the title or pay the premium. The Collector of Land Revenue served a notice on them under section 128 of the National Land Code to remedy their failure to alter the condition of land use "from agriculture to commercial." The respondents thereupon applied by Originating Motion for an order that the Collector of Land Revenue cancel the notice on the ground that the notice was bad and invalid. It was contended for the respondents as there was no expressed endorsement on the document of title pertaining to the category of land use, there was no necessity for them to apply for conversion. The application was allowed in the High Court and the appellant then appealed to the Federal Court.

Held, allowing the appeal: (1) the land in question was town land and on the coming into force of the National Land Code came under the provisions of section 53(3) of the Code which provides that it shall be used neither for agricultural nor for industrial purposes;

(2) in order to use the land for building, the owners have to apply for the imposition of the category of building under section 124 of the National Land Code;

(3) in this case the respondents have failed in erecting the building to apply for the imposition of the category "building" to their title and this failure constituted a breach of condition by reason of which action under section 128 of the National Land Code could and was taken.

Case referred to:-

(1) *Pengarah Tanah dan Galian, Wilayah Persekutuan* v. *Sri Lempah Enterprise Sdn. Bhd.* [1979] 1 M.L.J. 135.

HIGH COURT.

Kok Wee Kiat for the applicants.

Fong Seng Yee (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Harun J.: This is an appeal under section 418 of the National Land Code (NLC). It concerns a piece of land held under Certificate of Title No: 3443 Lot 36 Section 58, City of Kuala Lumpur.

This land was first alienated to H.C. Syers on July 20, 1886 under Lease for Agricultural Land No: 746. It was 100 acres in area bounded on the north by Ampang Road and on the east, south and west by